

APR 30 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES,
DERIVATIVE & "ERISA" LITIGATION,

MARK NEWBY, et al.,

Plaintiffs,

-against-

ENRON CORP., et al.,

Defendants.

MDL 1446

and Consolidated, Related and
Coordinated Cases

Civil Action No. H-01-3624
and Consolidated, Related and
Coordinated Cases

**DEFENDANTS BANK OF AMERICA CORPORATION AND
BANC OF AMERICA SECURITIES LLC'S SUPPLEMENTAL MEMORANDUM
IN FURTHER SUPPORT OF THEIR OPPOSITION TO LEAD PLAINTIFF'S
AMENDED MOTION FOR CLASS CERTIFICATION**

Defendants Bank of America Corporation ("BAC") and Banc of America Securities LLC ("BAS") submit this supplemental memorandum in further support of their opposition to Lead Plaintiff's Amended Motion for Class Certification. This submission is made in light of this Court's Order re Bank of America Defendants' Motion to Dismiss, dated April 8, 2004 (#2064) ("Bank of America Order") and its Order re Imperial County Employees Retirement System's Motion to Intervene, dated February 25, 2004 (#1999) ("Imperial County Order").

As demonstrated below, this Court should not certify a class of purchasers asserting a Section 12(a)(2) claim against BAS and related Section 15 claim against BAC with respect to the Marlin Notes. The proposed class representative, Imperial County Employees'

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Retirement Systems (“ICERS”), lacks standing to assert these claims since it has not alleged (and cannot allege) that it purchased any Marlin Notes from BAS or that BAS solicited its purchase of Marlin Notes. The Sections 12(a)(2) and 15 claims against BAS and BAC with respect to the Marlin Notes should be dismissed for the same reason.

In the Bank of America Order, this Court held that “[i]f, at the time of class certification, there is no class member that can demonstrate has [sic] standing to serve as a class representative for those who purchased Marlin Water Trust Notes from Banc of America Securities LLC, the § 12(a)(2) claim against it and the derivative § 15 claim against Bank of America will be dismissed.” Bank of America Order at 5.¹ Similarly, in its Imperial County Order, this Court held that “because of the statutory privity/seller restriction [in § 12(a)(2)], this Court concludes that as a matter of law while ICERS may intervene as a named plaintiff, under § 12(a)(2) ICERS, individually, can only sue, and therefore can only serve as a class representative for other purchasers for claims against, the entities that successfully sold to ICERS, or successfully solicited ICERS’ purchase of, the Marlin Water Trust II notes in the July 12, 2001 offering.” In re Enron Corp. Sec., Derivative & ERISA Litig., 2004 WL 405886, at *32 (S.D. Tex. Feb. 25, 2004).

In its Certification of Named Plaintiff Pursuant to Federal Securities Laws (“Certification”), ICERS states that it purchased 6.31% Marlin Notes on July 12, 2001.² See

¹ This Court made similar statements in its Orders regarding the motions to dismiss Section 12(a)(2) and related Section 15 claims filed by other financial institution defendants. See Order re J.P. Morgan Defendants’ Motion to Dismiss, April 5, 2004, at 10-11 (#2052); Order re Citigroup Defendants’ Motion to Dismiss, dated April 1, 2004, at 4 (#2050); Order re CIBC Defendants’ Motions to Dismiss, dated April 1, 2004, at 12 (#2048); Order re Lehman Defendants’ Motion to Dismiss, March 31, 2004, at 5 (#2043); Order re Barclays Defendants’ Motion to Dismiss, dated March 31, 2004, at 4 (#2042); Order re Credit Suisse Defendants’ Motion to Dismiss, dated March 31, 2004, at 15 (#2044).

² ICERS does not claim that it purchased 6.19% Marlin Notes. Nor does ICERS or any other entity assert that BAS sold it any of the €515 million 6.19% Marlin Notes. Moreover, BAS did not serve as an initial purchaser of those notes. See Appendix to Defendant Bank of America Corporation and Banc of America

Imperial County Employees Retirement System's and IHC Health Plans, Inc.'s Motion to Intervene under Fed. R. Civ. P. 24(b)(2), dated August 27, 2003, Exhibit A, Certification (attached hereto as Exhibit 1). Lead Plaintiff, in its Reply Memorandum in Response to Various Defendants' Oppositions to Class Certification, dated November 24, 2003 (#1854) ("Lead Plaintiff's Reply"), cites the ICERS trade confirmation and notes that ICERS purchased the 6.31% Marlin Notes from Deutsche Bank. See Lead Plaintiff's Reply at 83 ("as ICERS' trade confirmation makes clear, ICERS purchased from defendant Deutsche Bank.") The ICERS trade confirmation, which is attached as an exhibit to the Appendix to Lead Plaintiff's Reply, indicates that Deutsche Bank was the broker for the ICERS' purchase of Marlin Notes. See Plaintiff's Appendix in Support of Replies Regarding Motion for Class Certification, dated November 24, 2003, Exhibit 33 (#1855) (attached hereto as Exhibit 2). Clearly ICERS does not assert that it purchased the 6.31% Marlin Notes from BAS or that BAS solicited its purchase. No other proposed class representative is alleged to have purchased either issuance of Marlin Notes.

Securities LLC's Motion to Dismiss the First Amended Consolidated Complaint, dated June 18, 2003 (#1516), Exh. 1 (Marlin Water Trust II and Marlin Water Capital Corp. II Offering Memorandum for €515,000,000 6.19% Senior Secured Notes Due 2003 and \$475,000,000 6.31% Senior Secured Notes Due 2003, dated July 12, 2001, at Cover Page, F-48).

Accordingly, pursuant to the Bank of America Order and the Imperial County Order, this Court should not certify a class with respect to the Section 12(a)(2) claim against BAS and the related Section 15 claim against BAC and should dismiss these claims with prejudice.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT LLP

By: 5/ Gregory A. Markel

Gregory A. Markel (pro hac vice)*

(Attorney-in-Charge)

Ronit Setton (pro hac vice)

Gregory Ballard (pro hac vice)

100 Maiden Lane

New York, NY 10038

Telephone: (212) 504-6000

Facsimile: (212) 504-6666

Charles G. King

Texas Bar No. 11470000

King & Pennington LLP

1100 Louisiana Street

Suite 5055

Houston, TX 77002-5220

Telephone: (713) 225-8404

Facsimile: (713) 225-8488

Attorneys for Defendants

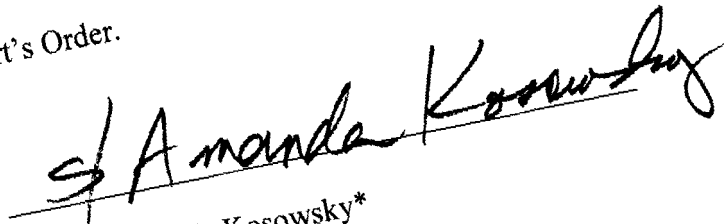
Bank of America Corporation and

Banc of America Securities LLC

*Signed by Charles G. King with permission

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2004, a true and correct copy of the foregoing Defendants Bank of America Corporation and Banc of America Securities LLC's Supplemental Memorandum in Further Support of their Opposition to Lead Plaintiff's Amended Motion for Class Certification is being served upon all counsel of record by website, <http://www.es13624.com>, pursuant to this Court's Order.


Amanda Kosowsky*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)
§

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

CLASS ACTION

IMPERIAL COUNTY EMPLOYEES RETIREMENT SYSTEM'S AND
IHC HEALTH PLANS, INC.'S MOTION TO INTERVENE
UNDER FED. R. CIV. P. 24(b)(2)

EXHIBIT A

**CERTIFICATION OF NAMED PLAINTIFF
PURSUANT TO FEDERAL SECURITIES LAWS**

IMPERIAL COUNTY BOARD OF RETIREMENT ("Plaintiff") declares:

- 1. Plaintiff has reviewed a complaint and authorized its filing.**
- 2. Plaintiff did not acquire the security that is the subject of this action at the direction of plaintiff's counsel or in order to participate in this private action or any other litigation under the federal securities laws.**
- 3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.**
- 4. Plaintiff has made the following transaction(s) during the Class Period in the securities that are the subject of this action:**

<u>Security</u>	<u>Transaction</u>	<u>Date</u>	<u>Price Per Share</u>
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See attached Schedule A.

- 5. During the three years prior to the date of this Certificate, Plaintiff has not sought to serve or served as a representative party for a class in an action filed under the federal securities laws except as detailed below:**

- 6. The Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost**

wages) directly relating to the representation of the class as ordered or approved by the court.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 16th day of July, 2003.

**IMPERIAL COUNTY BOARD OF
RETIREMENT**

By: Ronna D. Yarnell
Its: RETIREMENT ADMINISTRATOR

SCHEDULE A
SECURITIES TRANSACTIONS

Acquisitions

Acquisition Date	Type of Debt	Face Amount	Price Per Bond
07/12/2001	<u>Marlin Water Trust II</u> 8.31% due 7/15/2003	\$345,000	\$100.00

Sales

Sale Date	Type of Debt	Face Amount	Price
12/10/2001	<u>Marlin Water Trust II</u> 8.31% due 7/15/2003	\$345,000	\$15.85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)

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§ CLASS ACTION

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Defendants.

**PLAINTIFF'S APPENDIX IN SUPPORT OF REPLIES REGARDING
MOTION FOR CLASS CERTIFICATION**

EXHIBIT 2

EXHIBIT 33

RADFORD & MARZEC, INC.
33 South Hope Street, Suite 4050
Los Angeles, CA 90071

Tel: 213-687-9178
Fax: 213-687-9189

CONFIRMATION OF TRADE

Bradford & Marzec, Inc. reports the following trade for:

Imperial City Employees' Retirement Sys
940 W. Main Street
El Centro, CA 92243-2863
P24738

Transaction: BUY

Trade Date: 07/12/01 — Settlement Date: 07/19/01 —

DESC: MARLIN WATER 144A
CUSIP: 571228AC9
PAR VALUE/CURR FACE: 345,000.000 —
MOODY RATING: Baa
S&P RATING: BBB

COUPON: 6.3100 — MATURITY: 07/15/03 —
ISSUE DATE: 07/19/01 NEW ISSUE:
ORIG FACE: (mtg/asset-backed only)
FACTOR: (mtg/asset-backed only)
MARKET SECTOR: Industrial

PRINCIPAL: 345,000.00 ✓
INTEREST: 0.00
COMMISSION: 0.00
NET AMOUNT: 345,000.00

PRICE: 100.00000 ✓

BROKER: DEUTSCHE BANK

Special Instructions:

by: _____
Authorized Signature

Chase Manhattan Bank
114 East 47th Street - 3rd Floor
New York, NY 10036 - 1832